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No. 80-1429

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DUANE YOUNGBERG, Individually and in His Official Capacity as Superintendent, Pennhurst State School and Hospital, and RICHARD MATTHEWS, Individually and in His Official Capacity as Director of Resident Life, Pennhurst State School and Hospital, and MARGUERITE CONLEY, Individually and in Her Official Capacity as Unit Director, Unit 9, Pennhurst State School and Hospital,

Petitioners

v.

NICHOLAS ROMEO, an Incompetent, by His Mother and Next Friend, PAULA ROMEO,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

I. PLAINTIFF'S STATEMENT OF THE FACTS CONTAINS NUMEROUS STATEMENTS WHICH ARE ERRONEOUS OR MISLEADING OR WHICH WERE THE SUBJECT OF CONFLICTING TESTIMONY BEFORE THE JURY.

Respondent's brief[1] is replete with statements which either are not supported by any evidence in the record or were the subject of conflicting testimony before the jury.[2] It is the function of the jury to weigh conflicting evidence, and to judge the credibility of witnesses. *Lavender v. Kurn*, 327 U.S. 645, 652-53 (1946). So long as there is some evidentiary basis for the jury's resolution of factual disputes, on appeal the reviewing court will not disturb the verdict. *Id.* Because the jury found for them, defendants in this case are entitled to any inferences which may reasonably be drawn from the evidence. With this in mind, several important misstatements in plaintiff's brief must be noted.

1. Plaintiff's most glaring error in stating the "facts" is his repeated assertion that shackles were used on him for purely custodial purposes, *i.e.*, for the convenience of the staff (Resp. Bf. 4, 5, 10, 18-20, 30). To the contrary, restraints were used on plaintiff to protect him or others

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[1] The following abbreviations will be used herein: "Resp. Bf."—Brief for Respondent; "Pet. Bf."—Brief for Petitioner; "J.A."—Joint Appendix; "Pet. App."—Appendix to the Petition for Writ of Certiorari; "R."—Notes of Testimony; and "D.Ex."—Defendants' Exhibit.

[2] Plaintiff's errors on this point may spring either from his heavy reliance on the Third Circuit majority's description of the "facts", despite the absence of any special findings by the jury (Resp. Bf. 1, 2, 3, 4, 6), or from his reliance on the District Court decision in *Halderman v. Pennhurst State School and Hospital*, 445 F. Supp. 1295 (E.D. Pa. 1977), *aff'd*, 612 F.2d 84 (3d Cir. 1979) (*en banc*), *rev'd*, 451 U.S. 1 (1981) (Resp. Bf. 4, 14, 50). Neither is relevant here.

from his violent tendencies, and then, only when prescribed by a physician (R. 4-183; 5-221; 6-59, 67, 141; 7-39-40, 49, 76-78).

From the time Romeo arrived at Pennhurst in 1974, he was abusive to himself, other residents and the staff. *See, e.g.*, 6-188, 213, 7-72.[3] In February 1976, a psychologist developed a comprehensive program designed to reduce his aggressive behavior (R. 2-7; 5-88-90; 6-200-03; D. Ex. 1, 9),[4] but that program was never implemented because his mother, Paula Romeo, refused to agree to it (R. 1-53; 4-25; 6-204)). In September 1976, Romeo was placed in the hospital ward after breaking his arm (R. 5-256, 6-138). Shortly thereafter, he filed the complaint in this case (J.A. 1a).[5]

When his arm had healed and he normally would have returned to his ward, the parties, by their counsel, agreed that he should remain in the hospital due to the pending litigation (R. 5-248; 6-57-58, 137).[6] While in the hospital, Romeo's violent behavior posed a special threat to other patients (R. 7-40, 49, 76-78), some of whom were in traction or had intravenous tubes attached to them (R. 7-40). Thus, Dr. Gabroy, a physician who is not a defendant in this case, prescribed restraints[7] to protect Romeo and others, not for administrative convenience

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[3] Indeed, Romeo demonstrated similar behavior even before he was committed to Pennhurst (D. Ex. 12; R. 7-69-70; 73).

[4] That program called for short periods of separation from other residents ("time-out"), as well as periodic use of "muffs" on plaintiff's hands for a short period of time, to prevent him from attacking himself or others (R. 5-88; 6-88; 6-200-03).

[5] The original complaint makes no mention of a shackling claim.

[6] Three witnesses testified at trial that Romeo remained in the hospital pursuant to such an agreement (R. 5-248; 6-57-58, 137). Plaintiff offered no evidence to the contrary.

[7] "Soft" restraints, for the arms only, were generally used (R. 7-53-55, 79).

(R. 7-40, 49, 76-78).[8] Based on that prescription, plaintiff amended his complaint in 1977 to raise a shackling claim (Pet. App. 91a).

2. Plaintiff has also suggested that he received very limited programming while at Pennhurst. To the contrary, there are literally hundreds of pages of testimony and exhibits dealing with programs designed for plaintiff, including programs aimed at curbing his aggressive behavior, as well as programs dealing with feeding, showering, drying, dressing, attention, self-control and toilet training. *See, e.g.*, D. Ex. 10; R. 3-69-70; 5-44-56, 242-50; 6-162-66; 7-41-48. Programming continued to be provided even while plaintiff was in the hospital (R. 5-227, 248, 256; 6-50, 162; 7-32, 34, 41-48), and this programming resulted in a reduction of his aggressive behavior (R. 7-45).

3. Also misleading is plaintiff's assertion that defendants had taken the position in discovery that budgetary matters "are not even remotely related to this lawsuit" (Resp. Bf. 5, 38-39). This quotation is radically out of context. Plaintiff had attempted to compel production of *all* documents showing Pennhurst's sources and use of

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[8] Restraints were only used on a patient at Pennhurst when ordered by a physician (R. 5-221; 6-59, 67, 141; 7-39, 76). In this regard, plaintiff also suggests that the professional standard for judging the appropriateness of restraints is identical to that established by the lower court (Resp. Bf. 43-44). It is not. The lower court prohibited the use of restraints except where necessary to treat or protect the resident himself. Both professional standards and state and federal law permit the use of restraints to protect the resident *or others* (Resp. Bf. 43-44), thus allowing a balancing of both (1) the right of an individual resident to care and habilitation and the (2) right of the resident *and others* to be free from harm. The Court of Apeals did not, allowing only consideration of the individual resident's right to receive care and habilitation in the least restrictive manner, not the right of others to be protected from that resident.

funds since 1973 and *all* documents prepared for submission to Pennhurst's funding sources since 1973. Plaintiff's First Request for Production of Documents Nos. 14, 15, filed May 27, 1977. Defendant's objection was to the overbreadth of the request. The entire sentence on which plaintiff relies is as follows: "It is beyond reasonable dispute that the entirety of Pennhurst's financial and accounting records and filed [sic] are not even remotely related to this lawsuit." Defendants' Response to Plaintiff's Motion to Compel Production Documents, filed Aug. 24, 1977, at 11.[9]

4. Plaintiff also suggests, throughout his brief, that habilitation of the mentally retarded is a precise science, and that disputes over what is proper habilitation can be resolved readily by the federal courts. *See also* Brief of *Amici Curiae* American Orthopsychiatric Association, *et al.* The various *amici curiae* briefs filed in this case reflect the extent of the continuing dispute by professionals on this subject.[10] If experts in the field disagree over the value of different types of programming for the mentally retarded and the extent to which their functioning level can be improved, the courts are obviously poorly equipped to make such judgments. *See Parham v. J.R.*, 442 U.S. 584, 606-09 (1979).

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[9] In any event, budgetary and staffing considerations are proper concerns where institutionalized plaintiffs allege new constitutional rights. *See Bell v. Wolfish*, 441 U.S. 520 (1979).

[10] A recent series of articles in *Mental Retardation* highlights the differences among experts in this field. *See* Cavalier and McCarver, *"Wyatt v. Stickney* and Mentally Retarded Individuals," 19 *Mental Retardation* 209 (1981); Menolascino and McGee, "The *New* Institutions," 19 *Mental Retardation* 215 (1981); Ellis, *et al*, "Common Sense in the Habilitation of Mentally Retarded Persons: A Reply to Menolascino and McGee," 19 *Mental Retardation* 221 (1981); Menolascino and McGee, "Rejoinder to the Partlow Committee," 19 *Mental Retardation* 227 (1981).

5. Finally, plaintiff erroneously contends that he has no adequate state remedies (Resp. Bf. 33). While the Pennsylvania Supreme Court has recognized a limited statutory immunity for public officials from liability for actions taken in releasing someone from a state institution,[11] *Freach v. Shovlin*, 471 Pa. 583, 370 A.2d 1163 (1977), no Pennsylvania court has ever held that that immunity applies to the type of negligence or malpractice claims being raised here. Instead, the doctrine of official immunity under Pennsylvania law is extremely limited, applying only where some important public policy requires it. *Dubree v. Commonwealth*, 481 Pa. 540, 393 A.2d 293 (1978). Thus, official immunity under Pennsylvania law is much more limited than even the federal standard. *See Procunier v. Navarette*, 434 U.S. 555 (1978); Pet. Bf. 34-37.

Similarly, the state's immunity from suit in state courts is much more limited than its Eleventh Amendment immunity in federal courts. *See Mayle v. Pennsylvania Department of Highways*, 479 Pa. 384, 388 A.2d 709 (1978) (sovereign immunity abrogated). *See also Gibson v. Commonwealth*, 490 Pa. 156, 415 A.2d 80 (1980) (*Mayle* decision applied retroactively). Indeed, all acts of health care employees of Commonwealth institutions have been specifically exempted from any immunity. Pa. Stat. Ann. tit. 42 § 8522(b)(2) (reestablishes limited sovereign immunity). Thus, there is nothing "uncertain" or inadequate about the state law remedies available.[12]

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[11] *See* Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann. tit. 50 § 4603.

[12] Plaintiff's suggestion that, because the statute of limitations may have run by now, the remedy itself is inadequate (Resp. Bf. 33 n. 35) is simply absurd. Failure to pursue a remedy, whether out of neglect or a deliberate tactical decision, provides no basis for establishing a constitutional right.

II. PLAINTIFF'S EFFORT TO LIMIT OR IGNORE THE ISSUES BEFORE THIS COURT TOTALLY DISREGARDS THE DECISION OF THE *EN BANC* COURT OF APPEALS AND IS DIRECTLY CONTRARY TO THE POSITION HE TOOK IN THE LOWER COURTS.

Perhaps the most astounding thing about respondent's brief is his argument that the central constitutional issues decided by the Third Circuit are not presently before this Court. In so arguing, he ignores both the decision of the Court of Appeals and his own position below. For example, plaintiff states that:

> We do not discuss the circumstances, if any, under which the "least restrictive alternative" principle applies to habilitation of retarded persons. That issue is not presented in this case. Respondent's claims in this case are not premised on a right to "least restrictive" habilitation or treatment.

Resp. Bf. 10. *See also* Resp. Bf. 34, 41, 45-46. Plaintiff also would have this Court ignore the Third Circuit's holding that there is a constitutional right to habilitation, a holding basic to its decision in this case (Resp. Bf. 29).[18]

A quick review of the issues decided by the Third Circuit and the arguments raised by plaintiff below makes such an attempt nothing less than offensive. Plaintiff's strenuous efforts to avoid these issues in this Court is a clear indication of his view of the merits of the Third Circuit's decision on these points.

The simple answer to these incredible suggestions is that these issues were definitely decided by the *en banc* Court of Appeals. Moreover, unless reversed, the Third Circuit's ruling on these issues will be the law of this

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[18] Plaintiff's attempt to rely on state law to avoid the constitutional question, when he never pled or argued a state law right in any lower court, is discussed in Part III, *infra*.

case on remand,[14] as well as the final word in similar cases throughout the Third Circuit.

The Third Circuit held, *inter alia*, that the Due Process Clause of the Fourteenth Amendment provides the institutionalized mentally retarded with a right to treatment[15] which is acceptable in light of present medical or other scientific knowledge. 644 F.2d at 169, 173 (Pet. App. 38a, 47a).[16] Where restraints are used, the court held that defendants must show that it is "*the least restrictive method* of dealing with the patient." *Id.* at 161 (Pet. App. 18a) (emphasis added). Where "severe intrusions on individual dignity" or "significant deprivations of liberty" are involved,[17] "*the least intrusive treatment* available under the circumstances" must be provided, according to the lower court. *Id.* at 166, 173 (Pet. App. 30a-32a, 47a) (emphasis added).

The breadth of this holding is not surprising considering that plaintiff had expressly raised and pressed a constitutional right to treatment in the least restrictive

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[14] The court prescribed jury instructions for use on remand. 644 F.2d at 171 (Pet. App. 46a-47a).

[15] The court discussed the protection from harm and shackling claims separately. 644 F.2d at 159-64 (Pet. App. 14a-27a).

[16] While plaintiff discusses the holding below in terms of requiring "minimally adequate habilitation" (Resp. Bf. 45. n. 53), the decision cannot be so limited. By the Third Circuit's own definition of "habilitation", it encompasses " 'that education, training and care required by retarded individuals to reach their *maximum* development.' " *Halderman v. Pennhurst State School and Hospital*, 612 F.2d 84, 95 n. 14 (3d Cir. 1979) (emphasis added).

[17] While the court mentioned nonreversible physical operations or use of powerful antipsychotic drugs as examples of treatment involving "fundamental liberty violations," it did not even suggest that "significant deprivations" were limited to these areas. *Id.* at 166, 173 (Pet. App. 30a-32a, 47a). Rather, it left that decision for the jury. The court clearly would apply "least intrusive" analysis wherever a choice between treatment "aproaches" or "modes" is involved. *Id.*

alternative in the District Court, as well as in the Third Circuit. The following chronology is illustrative:

(1) In his Second Amended Complaint, plaintiff twice referred to a right to "treatment in the least restrictive alternative" (Pet. App. 91a).

(2) Plaintiff proposed jury instructions asserting that persons such as plaintiff have a right to "such treatment as will afford them a reasonable opportunity to acquire and maintain those life skills necessary to cope as effectively as their capacities permit," and "a constitutional right to treatment under the least restrictive conditions consistent with the purpose of the commitment" (Pet. App. 94a-95a).

(3) In the Third Circuit, a major section on plaintiff's brief was captioned: "THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT RESIDENTS OF A STATE MENTAL INSTITUTION HAVE A CONSTITUTIONAL RIGHT TO TREATMENT IN THE LEAST RESTRICTIVE ALTERNATIVE" (Brief for Appellants at 24).

Under these circumstances, there can be no doubt that the existence of rights to treatment and to the least restrictive alternative treatment are issues properly before this Court. Plaintiff's reliance on this Court's decisions in *Minnick v. California Department of Corrections*, 101 S. Ct. 2211 (1981), *Upjohn Co. v. United States*, 101 S. Ct. 677 (1981), and *Hodel v. Virginia Surface Mining Association*, 101 S. Ct. 2352 (1981) (Resp. Bf. 11, 46-47), is misplaced. There are neither significant ambiguities in the record, subsequent doctrinal developments nor the presentation of an abstract question of law.[18]

The Third Circuit has ruled on the claims presented to it by plaintiff and has laid down jury instructions for

[18] Under plaintiff's theory, this Court apparently would never review an order of a court of appeals involving a remand for a new trial because the theories and evidence might change. *But see Wood v. Strickland*, 420 U.S. 308 (1975).

the District Court's use on remand. Those issues are therefore properly before this Court for resolution.[19]

III. STATE LAW DOES NOT CREATE A SUBSTANTIVE DUE PROCESS RIGHT TO TREATMENT.

Plaintiff now relies heavily on an alleged state law statutory right to treatment as a basis for asserting a due process right to treatment (Resp. Bf. 15-16, 25-29). Because plaintiff never raised a state law claim below, this argument is not properly before the Court. Moreover, even if this contention were properly before the Court, it must be rejected because (1) a state statute cannot create a substantive due process right, and (2) in any event, the Mental Health and Mental Retardation Act of 1966 (MH/MR Act), Pa. Stat. Ann. tit. 50 § 4406, does not create a right to treatment.

The fundamental fallacy in plaintiff's argument on this point is his assertion that state statutes can create interests entitled to the substantive protection of the Due Process Clause. It is undisputed that a state statute can create a liberty interest which cannot be deprived without *procedural* due process. *See, e.g., Vitek v. Jones*, 445 U.S. 480 (1980); *Wolff v. McDonnell*, 418 U.S. 539 (1974). This proposition flows naturally from this Court's decisions recognizing that a state statute can create a property interest entitled to procedural protection

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[19] In any event, certainly plaintiff, having pressed these constitutional claims below, should not now be heard to say that they are not before this Court. While plaintiff can always concede that certain of his claims are meritless, and an inference can be drawn that this is what he is really saying with this argument, he cannot, in good faith, continue to urge that the Third Circuit's decision on this point be affirmed. Some courts have applied the doctrine of "judicial estoppel" to preclude such an attempt to "play fast and loose with the courts." *See, e.g., Scarano v. Central Railroad Co. of New Jersey*, 203 F.2d 510, 513 (3d Cir. 1953); *Wade v. Woodings-Verona Tool Works, Inc.*, 469 F. Supp. 465, 467 (W.D. Pa. 1979).

under the Due Process Clause. *See, e.g., Perry v. Sinderman*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972). However, whether there exists a liberty interest for procedural due process purposes is a very different question from whether a substantive due process interest is present. *See Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 842 n. 48 (1977).

The due process protections in *Wolff* and *Vitek*, the cases on which plaintiff relies, were procedural; due process did not guarantee McDonnell his good time credits, nor conclude that Jones was not mentally ill. Instead, due process required that hearings determine whether the facts warranted the loss of liberty or property. The manner of deprivation was at issue, not the fact of deprivation. In contrast, plaintiff here neither seeks a hearing nor concedes that were on provided, his "right" to treatment could be curtailed. Thus, the procedural due process cases on which plaintiff relies are inapposite.

Moreover, there are important reasons underlying this distinction. If every state statute which touches upon liberty interests in the procedural due process sense also created a substantive due process right, the substantive protection of the Due Process Clause would be radically expanded. Indeed, every violation of any state statute requiring government action would give rise to a federal claim under 42 U.S.C. § 1983 for violation of substantive due process. Such a result would also violate concepts of federalism. The division of functions between our state and federal governments has long been recognized by this Court. *See Rizzo v. Goode*, 423 U.S. 362, 378 (1976); *Younger v. Harris*, 401 U.S. 37, 44-45 (1971). Under those principles, it is one thing to use federal law—procedural due process—to create a *state* judicial or administrative forum to hear state law issues. It is quite another to use federal law—substantive due process—to create a *federal* forum to hear those state law issues.

In any event, the MH/MR Act does not create a right to treatment (Pet. Bf. 17-18). Plaintiff's reliance on *In Re Joseph Schmidt*, 429 A.2d 631 (Pa. 1981), as support for a contrary result, is misplaced. Despite dicta on certain state law rights, the holding there was limited to which government entity—the state or the county—had responsibility for finding a long-term institutional placement for Joseph Schmidt. *See also In Re Guzan*, 45 Pa. Commonwealth Ct. 525, 405 A.2d 1036 (1979).

Thus, the MH/MR Act does not establish a right to treatment, let alone provide the basis for such a right as a matter of substantive due process.

IV. THE ISSUE OF GOOD FAITH IMMUNITY HAS BEEN PRESERVED FOR APPEAL.

Plaintiff's suggestion that the issue of good faith immunity has not been preserved for appeal (Resp. Bf. 51 n. 62) is meritless. In the District Court, defendants requested an instruction on good faith immunity (J.A. 41a-42a) and the judge instructed the jury on this issue (J.A. 76a). In the Third Circuit, they again argued the issue in their brief (Brief of Appellees at 33-40). In any event, no court has ever held that an appellee has the burden of raising the issue of good faith immunity by a cross-appeal where the jury found in his favor. Simply stated, a fully successful party has no obligation and, indeed, no ability to appeal.

Thus, the issue of good faith immunity is properly before this Court and provides an independent basis for reinstating the judgment of the District Court.[20]

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[20] In plaintiff's argument on good faith, he also incorrectly states that "[t]he Pennsylvania Attorney General's representation of petitioners means that they will in fact be indemnified against any judgment in this case" (Resp. Bf. 55 n. 66). To the contrary, under 4 Pa. Code §§ 39.2-39.3, indemnification is discretionary, not mandatory, even where the Attorney General provides representation.

CONCLUSION

The decision of the Third Circuit Court of Appeals should be vacated with directions to affirm the judgment of the District Court.

Respectfully submitted,

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